COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Complaint of WorldCom Technologies, Inc.)

Against New England Telephone and Telegraph) D.T.E. 97-116

Company, d/b/a Bell Atlantic-Massachusetts)

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Complaint of Global NAPs, Inc.)

Against New England Telephone and Telegraph) D.T.E. 99-39

Company, d/b/a Bell Atlantic-Massachusetts)

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REPLY COMMENTS OF

BELL ATLANTIC-MASSACHUSETTS

Bell Atlantic-Massachusetts ("BA-MA") submits that the comments filed by other parties provide no basis for granting the motion of Global NAPs ("GNAPs") requesting that the Department vacate its Orders of May 19, 1999 (D.T.E. 97-116-C) and February 25, 2000 (D.T.E. 97-116-D/D.T.E. 99-39) and that the Department

reinstate the Order dated October 21, 1998 (D.T.E. 97-116). To the contrary, these comments simply reiterate GNAPs' fatally flawed arguments.

DISCUSSION

A. The Arguments of the Parties Supporting GNAPs' Motion Are Based On Flawed Assumptions.

Like GNAPs' Motion itself, the comments submitted by various parties all suffer from the same fatal flaw – they erroneously elevate the *dicta* contained in the D.C. Circuit Court's March 24, 2000 decision to the level of substantive controlling authority regarding the regulatory status of Internet-bound traffic and the eligibility of such traffic for reciprocal compensation payments under the Act. In fact, although the decision lays out the Court's reasoning for remanding the matter to the FCC, the Court's ruling does not determine how the FCC – the entity charged with interpreting the 1996 Act – will address the issues on remand. The simple point of law which all of the commenting parties ignore is that the Court expressly did not render a substantive ruling on the underlying issues in the case, *i.e.*, whether Internet-bound traffic is "local" traffic or whether it is "telephone exchange service" or "exchange access service." Instead, as BA-MA explained in its Opposition to GNAPs' Motion, all the Court has done at this point is to require that the FCC further explain, in light of the provisions of the 1996 Act, why it reached the conclusions set forth in its *Internet Traffic Order*. *See* BA-MA Opposition, at 6.

To attribute a different "legal" significance to the ruling, and hence suggest that the Department is required as a matter of law to vacate the D.T.E. 97-116-C and D.T.E. 97-116-D Orders, is plainly wrong. Although the Court found that the FCC did not adequately explain its decision that Internet-bound traffic is not subject to reciprocal compensation, it left the FCC free to reach the same result on remand – something the Court would not have done if the statute or regulations resolved the question the other way. The fact that the GNAPs supporters feel compelled to distort completely the import of the D.C. Circuit's decision by claiming that it determined *as a matter of law* how Internet-bound traffic must be treated under the 1996 Act only highlights the inherent flaw of their claim. Since it has been the clear intention of the Department in this case to follow the FCC's classification of Internet-bound traffic, the Department has no basis for taking any action in this case to either vacate or reinstate any of its rulings until the FCC provides the further explanation required by the Court.

For a number of reasons, there is absolutely no reason to conclude that the D.C. Circuit ruling will lead the FCC to alter its determination that Internet-bound calls are non-local calls or subject them to the dictates of its reciprocal compensation rules. Thus, GNAPs' Motion creates the illogical situation in which the Department may likely be required, if it were to grant the Motion, to reverse course once the FCC affirms its findings in the *Internet Traffic Order*.

First, to date there is no indication that the FCC has changed, or will change, its positions on the non-local character of Internet-bound traffic, the fact that Internet-bound traffic is "exchange access service," and that "the reciprocal compensation requirements of section 251(b)(5) of the Act and [the FCC's implementing] rules do not govern inter-carrier compensation for this traffic." *Internet Traffic Order*, at n. 87; *see also* Order on Remand, *In the Matter of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91 (rel. Dec. 23, 1999). On the contrary, the only public statement by the FCC since the D.C. Circuit's decision suggests that the FCC intends to confirm its findings in the *Internet Traffic Order*. In an article published in *TR Daily* on the day of the D.C. Circuit's decision, the FCC Common Carrier Bureau Chief stated that he continued to believe that Internet-bound calls are interstate in nature and that some fine tuning and

further explanation should satisfy the court that the agency's view is correct. He noted: "It seems to me that what the court is really telling us is that we need to better articulate our position … We need to take the confusing precedents and make clear to the court why this is interstate traffic." *See* Attachment A (*Strickling Believes FCC Can Justify Recip Comp Ruling In Face of Remand*, TR Daily, March 24, 2000).

Second, in a different recent order, the FCC has already addressed one of the primary concerns expressed in the D. C. Circuit's decision. While the D.C. Circuit stated that the FCC had not sufficiently explained why Internet service constituted "exchange access" and not "telephone exchange service," the FCC has explained in detail that calls to ISPs constitute interstate "exchange access" not "telephone exchange service." The D.C. Circuit declined to consider that conclusion, however, because "[t]he Commission . . . did not make this argument in the ruling under review."

Third, the conclusion sought by GNAPs and the other parties here would directly conflict with virtually all FCC precedent – the precedent which the Department misconstrued in its initial decision in this case. When the FCC created the access charge regime in 1983, it held that "enhanced service providers" – a category that includes ISPs – "obtain local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls." In this respect, the FCC explained that ISPs were indistinguishable from long-distance telephone companies; the "interstate calls" facilitated by enhanced service providers merely "transit" the provider's location. Driving the point home, the FCC further stated that the overwhelming majority of ISP traffic does not terminate at the ISP's premises, noting that an enhanced service provider "might terminate few calls at its own location and thus would make relatively heavy interstate use of local exchange services and facilities." The FCC has repeatedly confirmed this holding over the past 17 years.

The FCC did not deviate from this position in the *Internet Traffic Order*. In fact, it explicitly reaffirmed its decision that Internet-bound traffic is interstate in nature. As the FCC observed, in the case of Internet-bound traffic, the ISP is merely an intermediate point in a continuous transmission that ends only when it reaches a website. Indeed, it is the very fact that the Internet allows its users to connect to people and information sources all over the world that makes the Internet what it is, and that has led to the vast increase in Internet traffic on the public switched network. Nothing in the D.C. Circuit's recent decision alters this conclusion.

Indeed, no other result is possible in light of existing law. In its recent *Advanced Services Remand Order*, released on December 23, 1999, the FCC analyzed the manner in which ISPs provide Internet access service to their subscribers. The FCC unequivocally held that such service is:

> exchange access service because it enables the ISP to transport the communication initiated by the end-user subscriber located in one exchange to its ultimate destination in another exchange, using both the services of the local exchange carrier and in the typical case the telephone toll service of the telecommunications carrier responsible for interexchange transport.

In the same order, the FCC also expressly overruled a previous statement that suggested that ISPs do not obtain exchange access (a statement that the CLECs had cited for the proposition that ISP traffic is local). In doing so, the FCC underscored that ISP traffic is non-local traffic and that its precedents, with the single exception of the one it overruled, had always so held.

This FCC determination was not questioned by the D.C. Circuit in its review of the *Internet Traffic Order*. In fact,

the court expressly acknowledged that the FCC's interpretation "as to whether calls to ISPs fit within 'exchange access' or 'telephone exchange service' . . . would be subject to judicial deference." In view of the *Advanced Services Remand Order*, it is unlikely that the FCC could conclude that ISP-bound traffic is jurisdictionally local and subject to its reciprocal compensation rules.

In summary, GNAPs' and the other parties' claim rests on the unfounded and erroneous premise that the FCC's determination in the *Internet Traffic Order* that Internet-bound traffic is jurisdictionally non-local traffic was reversed by the D.C. Circuit and that Internet-bound calls now fall within the FCC's definition of local traffic. The Court did not make such a finding, nor did the Court decide the issue. The Court ruled only that the FCC must provide a clearer explanation for its decision. There is absolutely no basis for concluding that the FCC will alter its determination that Internet-bound calls are non-local calls or subject them to the dictates of its reciprocal compensation rules. On the contrary, virtually all FCC precedent treats such traffic as non-local traffic. Accordingly, the Department should deny GNAPs' Motion and await the FCC's ruling in the remand proceeding before taking any other action in this case.

B. Decisions of Other Jurisdictions Do Not Support GNAPs' Motion.

The parties' cite a number of state and federal court decisions that reached a different conclusion than the Department did in the D.T.E. 97-116-C and D.T.E. 97-116-D Orders. As the Department has already found in this case, while it may be informative to know how other states have applied the FCC's ruling to the situations in their states, "the underlying facts, analytical underpinnings and applicable law vary enormously from state to state." D. T.E. 97-116-C, at 25 n.27. Therefore, the Department should not set aside its well reasoned decisions, based on the factual and legal circumstances in Massachusetts, because other states have reached different conclusion based on their situations, the interconnection agreements before them, and prior decisions rendered." *Id.*

Several parties place particular emphasis on the 5th Circuit decision *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 2000 WL 332062 (5th Cir. March 30, 2000) *See e.g.*, Comments of RCN, Allegiance, and Focal (May 5, 2000), at 5, 8-9; Comments of MCI (May 5, 2000), at 3, 13-14. This emphasis is misplaced.

Contrary to the representations of the parties, the 5th Circuit does not "confirm that the Department's original interpretation of the Agreement in the October 1998 Order was correct." Comments of MCI, at 13. *See also* Comments of RCN, Allegiance, and Focal, at 5. The 5th Circuit addressed a state commission's interpretation of two interconnection agreements entered into between two parties (Southwestern Bell and Time Warner). In interpreting these agreements prior to the FCC's issuance of its *Internet Traffic Order*, the Texas PUC ruled that the interconnection agreements included calls to ISPs within the definition of "Local Traffic," and as such generated reciprocal compensation obligations. *Id.* at *2. The district court upheld this ruling on appeal. *Id.* While the appeal to the 5th Circuit was pending, the FCC issued the *Internet Traffic Order*, which the *5th* Circuit acknowledged "definitively established that modem calls to ISPs constitute jurisdictionally mixed, largely interstate traffic." *Id.* at *6. However, the 5th Circuit ruled that it would not disturb the Texas PUC's determination that the parties had *agreed* to pay each other reciprocal compensation for Internet traffic based on the record before it. Moreover, the Court ruled that the Texas PUC's finding regarding the parties' agreement did not violate the Act. *Id.* This later ruling should come as no surprise since the terms of a negotiated agreement do not have to conform to the requirements of the 1996 Act. 47 U.S.C. § 252(e)(2)(A).

Here, the matter stands in an entirely different posture. BA-MA has agreed to pay reciprocal compensation only

for local traffic as required by the 1996 Act. The Department has "confined its enquiry in this matter solely and exclusively to whether the ISP-bound traffic in question was "local" (i.e., intrastate) or interstate calling." *MCI WorldCom*, D.T.E. 97-116-C, at 21. The Department has used applicable FCC precedent for making this determination, and in its D.T.E. 97-116 Order, the Department erroneously concluded that FCC precedent *required* that Internet-bound traffic be treated as "local" traffic and thus subject to reciprocal compensation under the 1996 Act. The FCC's *Internet Traffic Order* established conclusively that the Department had misinterpreted that precedent, and therefore, the Department properly vacated the D.T.E. 97-116 Order because it was based on a "mistake of law, *i.e.*, on an erroneous characterization of ISP-bound traffic and on a consequently false predicate for concluding that jurisdiction was intrastate." D.T.E. 97-116-C, at 24. There is absolutely nothing in the 5th Circuit's opinion that alters the Department's conclusions.

C. AT&T's Suggestion That BA-MA Agreed That Traffic to ISPs was Eligible for Reciprocal Compensation Under the Act is Without Merit.

At page 11 of its Comments, AT&T claims that it is "undisputed" that "[a]t the time the current ICA's were negotiated in Massachusetts, it was under understood by all parties – including Bell Atlantic and Nynex – that ISP-bound traffic was local under the then-current FCC decisional law." This argument is specious.

First, AT&T is incorrect in stating that it was "undisputed" and understood by the parties to interconnection agreements that Internet-bound traffic was "local." BA-MA's consistent position has been that such traffic was not local and not subject to reciprocal compensation under the Act. Indeed, AT&T cannot claim otherwise because this very case was open when its signed its interconnection agreement with BA-MA.

Second, AT&T's reference to comments filed by Bell Atlantic in the FCC's *Local Competition* proceeding takes those comments out of context. When the comments were filed, interexchange carriers ("IXCs") were arguing that the reciprocal compensation provisions of the 1996 Act applied to interexchange calls (which include Internet calls), as well as local calls. Bell Atlantic disagreed that reciprocal compensation applied to interexchange calls, an issue that had not yet been decided. Subsequently, the FCC rejected the IXCs' position and ruled that the reciprocal compensation provisions applied only to local calls. *Local Competition Order* at ¶ 191.

Contrary to AT&T's contention, BA-MA has consistently and repeatedly asserted that Internet–bound traffic is not local traffic subject to reciprocal compensation under the 1996 Act. BA-MA's position has been recognized as correct by the FCC in its *Internet Traffic Order*, and it is likely that the FCC will affirm that ruling in its remand proceeding. The suggestion that the issue has been "undisputed" by BA-MA is incorrect.

CONCLUSION

For the foregoing reasons, and for those set forth in BA-MA's Opposition, the Department should deny GNAPs' Motion.

Respectfully submitted,

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By its attorneys,

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